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IN THE

Supreme Court of the United States

No. 20—October Term, 1932.

EARLE & STODDART, INC., *et al.*,
Petitioners,

against

ELLERMAN'S WILSON LINE, LTD., Owner and Operator of the Steamship *Galileo*,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENT.

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IN THE

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against

Ellerman's Wilson Line, Ltd.,
Owner and Operator of the Steamship *Galileo*,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENT.

The case is reported below in the District Court as *Earle & Stoddart* vs. *Ellerman's Wilson Line*, 45 F. (2d) 231, R. 582, and in the Circuit Court of Appeals, 54 F. (2d) 913, R. 641.

Statement of the Case.

A libel *in personam* was filed in the United States District Court for the Southern District of New York against the owner of the S.S. *Galileo* by 136 cargo owners to re-

cover $650,000 for loss and damage to merchandise which occurred by reason or by means of a fire happening on the Steamship *Galileo* in August, 1926. The seriousness of the fire was discovered shortly after the voyage from New York to Hull began. Thereafter the steamer returned to New York and became a total loss with her cargo when the vessel sank in New York harbor as a result of the fire and the water used in an effort to extinguish the fire.

The parties agreed that the fire was the proximate cause of the loss, and the Courts below so found. R. 642.

The cause of the fire, which started in a temporary coal bunker in #3 'tween deck, as both Courts below concurrently found, was clearly shown to have been the negligence of Chief Engineer Oxtoby of the *Galileo* in failing to remove coal in #3 'tween deck bunker which had become heated from spontaneous combustion, and in loading, after due warning of the actual situation, further coal on top of the heated coals in the bunker. R. 307-309, 313-316, 326, 328-334.

The evidence showed, and both Courts below concurrently found, that no other member of the ship's personnel or any shore representative of the Respondent, or the Respondent itself, participated in or had any knowledge whatsoever of this negligence. R. 308.

Oxtoby was solely to blame and his negligence was the proximate cause of the fire.

Oxtoby's actions involved a failure in respect to a simple and usual duty of a chief engineer in a situation practically identical with that which existed in *Walker* v. *Transportation Co.*, 3 Wall. 150.

Because all the issues of fact litigated below were decided in Respondent's favor, the libels were dismissed.

Statement of Facts.

The *Galileo* was a steel general cargo steamer of the shelter deck type, of 6,300 tons gross and 4,090 tons net register. R. 208. So far as her physical condition was concerned, she was in all respects seaworthy and properly manned, equipped and supplied, and both Courts below so found. R. 582, 642. In fact, she had a few months before the accident in question successfully gone through Lloyd's Register No. 1 periodical survey and received a certificate of seaworthiness.

The fire in the *Galileo's* bunkers concededly made the vessel unseaworthy. Any such fire in a ship, of course, renders a vessel "unseaworthy" in the broad sense in which the term is sometimes used.

The assertion frequently made in Petitioners' brief that "unseaworthiness" caused the fire is not accurate. The fire rendered the vessel unseaworthy. The parties agreed in the Court below that the proximate cause of the loss was the fire. R. 642. And there can be no doubt about it, as both Courts found.

The libels filed by the Petitioners made no allegation of unseaworthiness in any particular.

The *Galileo* was regularly employed in service between New York, Boston, Hull and Newcastle and was home in Hull every few weeks. R. 293.

The owners maintained a Marine Superintendent and a Superintending Engineer at Hull. Oxtoby, the chief engineer of the vessel, was responsible to Mr. Brackenbury, the owners' Superintending Engineer at Hull, to whom he re-

ported in writing at the conclusion of every round voyage. R. 308, 481, 461, 462; *Exhibit* 29, p. 580.

The owners did not have any Marine Superintendent or Superintending Engineer at New York. R. 304, 305, 337, 461, 462. At New York the captain of the vessel was in complete charge respecting all matters dealing with repairs, stowage of cargo, and supplies. R. 337, 339, 340, 346, 347. The chief engineer, under the captain, had complete charge of the coal and the places for its stowage. R. 336, 337, 342, 343, 458, 462, 304, 305, 259, 260.

Oxtoby was an engineer of 33 years' experience. He had held a chief engineer's license since 1902 and had actually served as a chief engineer on steam vessels for 14 years. R. 292, 293. Brackenbury had known Oxtoby for 20 years and regarded him as a competent engineer. The owners had given Oxtoby adequate instructions regarding the care of coal. Exhibit G, R. 575. See also R. 589.

The freight agent of the owner in New York is Ellerman's Wilson Line, New York, Inc. It was not a "managing agent." R. 334, 336. The function of this agent at New York was limited practically to the solicitation of cargo and the collection of freight. It had no duties regarding the inspection of coal, which was entrusted by the owner, in accordance with the usual custom, to Oxtoby, the chief engineer. R. 375, 421, 438, 458, 471.

The *Galileo* arrived in New York on August 16, 1926, with about 100 tons of bunker coal remaining from her previous voyage in #3 shelter deck and about 160 tons in #3 'tween deck bunkers.

It had been expected that the steamer would not take any additional coal at New York, because it was proposed to lay her up upon her return to Hull, to install some addi-

tional refrigerating apparatus. R. 300, 301, 261, 262, 457, 458.

After arrival in New York, and on August 20th, the owner sent a cable to the New York freight agents to take 850 tons of additional bunkers, to be transferred at Hull to the *Francisco,* a sister ship. *Exhibit* D, R. 572. This order was communicated to the master and by him passed on to the chief engineer. It was decided by the captain and chief engineer to carry this additional bunker coal in the temporary bunkers in #3 'tween deck and #3 shelter deck. R. 301, 304, 305, 263, 266, 267, 268, 272. No one else participated in this decision. R. 272. Neither the owners nor any of their shore freight representatives knew anything about it.

The coal remaining in temporary bunkers in #3 shelter deck and #3 'tween deck could have been shifted into the permanent bunkers of the *Galileo* if the chief engineer and the master had so decided. R. 312.

When the additional coal was being loaded into the temporary bunker in #3 'tween deck on the morning of August 25th, the coal stevedores who were down in #3 'tween deck bunker trimming the coal complained to their head man, who in turn complained to Magarelli, the foreman of the stevedores, that some of the coal remaining in the bunker had become heated. R. 329-331. Magarelli went down himself and verified this information. At this time the spontaneous combustion in the coal had proceeded to the point where even the surface of the coal pile burned the boots of the coal trimmers. R. 307. In fact, a strong odor of coal gas, as a result of the combustion on the *Galileo,* was detected by Magarelli on a coal boat alongside the vessel. R. 331. The odor of coal gas proves that some of the coal had reached the ignition point. R. 485.

Magarelli returned to the deck and reported the whole matter to Oxtoby, the Chief Engineer. R. 330. Oxtoby said that the coal was all right, but did not go down into the 'tween deck, and ordered Magarelli to "Carry on." R. 307, 308, 330, 331. The conversation between Magarelli and Oxtoby occupied about two minutes.

The bunkering proceeded and in a very short time the old hot coals, as a result of Oxtoby's negligence, were entirely covered by the new coal.

Following the covering of the old coal with the new coal, it was, of course, impossible for anyone to learn of the heated coals underneath, which were completely covered up by the large supply of new coal. R. 589.

On August 28th at 12:50 p. m. the vessel proceeded to sea. Concededly at this time the vessel had a fire in #3 'tween deck bunkers, for within six hours of sailing, a serious fire was discovered and the vessel was turned around and proceeded back to New York. In the effort to put out the fire a large quantity of water was pumped into the vessel, which eventually turned over and sank. All but a small part of her cargo thus became a total loss from fire.

The Opinions of the Courts Below.

Both Courts below concurrently found:

1. That the proximate cause of the loss was the fire.

2. That the proximate cause of the fire was the negligence of Chief Engineer Oxtoby.

3. That at the time of sailing the vessel was unseaworthy because Oxtoby had loaded new coal on old coal which had become heated and was giving off gases.

4. That no design or neglect of the owner had contributed to the disaster.

5. That the Fire Statute (R. S. 4282) constituted a defense to the owner because the fire had been caused without any neglect or design on the part of the owner of the steamer.

6. That the Fire Statute differs from the Harter Act in that the Harter Act imposes as an express condition of exemption from liability thereunder that the owner exercise due diligence to make the vessel seaworthy, whereas the Fire Statute contains no such provision, but grants exemption on condition that the fire be not caused by the design or neglect of the owner.

7. That the Respondent did not waive the protection of the Fire Statute in the bills of lading and contract itself into unlimited liability, but on the contrary had expressly contracted in each of the bills of lading that it should have the benefit of the Fire Statute.

Contentions of the Petitioners.

Petitioners' contentions, as we understand them, are as follows:

1. That the Fire Section of the Limited Liability Act of March 3, 1851, is not a defense because, owing to Oxtoby's negligence, the vessel was unseaworthy at the commencement of the voyage and seaworthiness is a condition precedent to any relief under the Fire Statute.*

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* Compare this contention with the following statement at page 56 of Petitioners' Brief.

"It is obvious, of course, that both the British and American Fire Statutes do apply to unseaworthy vessels in so far as the loss results from fire and not from unseaworthiness."

2. That in any event the Respondent made "personal contracts" in the form of bills of lading with the Petitioners, containing an "express warranty of seaworthiness," and thus waived the protection of the Fire Statute and contracted itself into an unlimited liability for fire.

The basis for this second contention is inaccurately and unfairly set forth, as we will show under the Second Point of this Brief, *infra*, 42. The purported quotation from one of the bills of lading contained at page 8 of Petitioners' Brief is a complete distortion of the contents of even that bill of lading. *Infra*, p. 46.

Summary of Argument.

I. The decree should be affirmed on the concurrent findings of the lower Courts on all issues tried. Petitioners' libels merely alleged the shipment of cargo in good condition and the failure to deliver at destination. Thus, the libels were simple suits for breach of contract. No claim of negligence or unseaworthiness was alleged.

The answer of the Respondent was that the goods were lost in a fire and that the Fire Statute (R. S. 4282) constituted a complete defense. The Fire Statute is quoted at page 15, *infra*.

At the trial the Respondent showed, and both Courts below found, that the loss was caused by fire. The Petitioners endeavored to show that the *Galileo* was unseaworthy in various physical respects and that the owners had been personally negligent. All of these contentions were rejected by both Courts.

In the Circuit Court of Appeals the parties agreed that the fire was the proximate cause of the loss. R. 642.

Concededly the *Galileo* was unseaworthy *because of the fire.*

Both Courts below found that the proximate cause of the fire was the gross negligence of Chief Engineer Oxtoby in loading new coal in #3 temporary bunker on top of coals remaining from a previous voyage which were heated and giving off gases.

Both Courts also found that no design or neglect of the owner contributed in any way to the disaster.

The Petitioners contended in the District Court that the Respondent had waived the Fire Statute by the provisions of the bills of lading. R. 591. The Petitioners made no claim in the District Court that the bills of lading constituted "personal" contracts containing "an express warranty of seaworthiness."

In the Circuit Court of Appeals the Petitioners asserted that the bills of lading covering the Earle & Stoddart, Inc. and Sanday & Co. shipments were "personal" contracts, R. 647, but made no such claim regarding the balance of the shipments. See Appendix A of this Brief, which quotes in full Point V of Petitioners' Brief in the Circuit Court of Appeals.

The Circuit Court of Appeals found it unnecessary to make any finding as to whether or not the Earle & Stoddart and Sanday & Co. shipments were "personal" contracts. R. 647.

Both Courts below found that the owner had not made any express warranty of seaworthiness, had not waived the Fire Statute, but on the contrary had expressly contracted in the bills of lading that all shipments were subject to the provisions of the Fire Statute. *Opinion of the*

District Court, R. 591; *Opinion of the Circuit Court of Appeals*, R. 647; *Second Point, infra*, p. 42.

These simple issues were the only ones tried in the Courts below. In accordance with the usual rule, concurrent findings of the lower courts will not be disturbed.

II. The Limited Liability Act of March 3, 1851, c. 43, 9 Stat. 635, as amended, quoted *infra*, p. 15 constitutes a complete defense to the owner of the *Galileo* for the fire.

It is immaterial under the Fire Statute how, where or at what time the fire is brought about "unless such fire is caused by the owner's neglect or design." This rule is well settled in this Court:

> *Moore et al.* v. *American Transportation Co.*, 24 How. 1;
> *Walker* v. *Transportation Co.*, 3 Wall. 150;
> *Craig* v. *Continental Insurance Co.*, 141 U. S. 638;
> *Providence & N. Y. SS. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588, 589, 602, 603;

and other cases, *infra*, pp. 22-26.

The Fire Statute was enacted as a result of a fire which occurred on the *Lexington* in 1840 due to unseaworthiness before leaving port, and in order to make the American law the same as the English law. *Moore et al.* v. *American Transportation Co.*, 24 How. 1, 38. Thus the very case which led to the passage of the Fire Statute was one involving loss by fire when the vessel was unseaworthy upon sailing.

The American Fire Statute was taken from an earlier British Act (26 Geo. III, c. 86) as was pointed out in *Norwich Co.* v. *Wright*, 80 U. S. 104, 117, and the present British

Statute (57 & 58 Vict., c. 60, Sec. 502) is very similar to the American Statute.

The British Fire Statute is quoted *infra*, p. 34. Under British law it is well established that the owner of a vessel unseaworthy at the commencement of the voyage, in the case of a fire occurring without his fault or privity, is not liable for the fire. See authorities *infra*, p. 35.

All the authorities in this Court show that seaworthiness is not a condition precedent to the shipowner's receiving the benefits of the Fire Statute or other sections of the Limited Liability Act.

Under the Limited Liability Act a shipowner is entitled to complete exoneration for fire, if caused without his design or neglect, and in any event to limit his liability to the value of the vessel and freight, if the loss occurred without his privity and knowledge. Whether or not the vessel was seaworthy is immaterial. Authorities, *infra*, p. 29.

There is a vital difference between the Limited Liability Act and the Harter Act. The Harter Act is quoted *infra*, p. 26. Congress made it a condition to the shipowners' obtaining the benefits of the Harter Act that the owner should exercise due diligence to make the vessel seaworthy.

Congress, in passing the Limited Liability Act in 1851, imposed no such condition.

Congress, in passing the Harter Act in 1893, expressly provided that none of the provisions of the Harter Act should be held to modify the provisions of the Fire Statute. *infra*, p. 27.

Congress, therefore, has made a special policy for losses due to fire.

Most of the long quotations in Petitioners' Brief are from Harter Act cases, which obviously have no materiality

here. Petitioners have fallen into the confusion on this point against which the Circuit Court of Appeals warned them. R. 645.

The decision of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, does not stand for the proposition stated by the Petitioners, but supports the decisions below. *Infra*, pp. 36-39.

There is no case in the books holding a shipowner liable for a fire where there has not been a finding by the court that the shipowner's personal neglect was the cause of the fire. Authorities, *infra*, p. 29.

III. The statement made repeatedly in Petitioners' Brief in this Court that Respondent made "personal" contracts containing "express warranties of seaworthiness," has no basis in the record.

Respondent did not make any contract, "personal" or otherwise, with the Petitioners containing an express warranty of seaworthiness. *Infra*, pp. 42-45.

Petitioners' attempt to invoke here for the first time the doctrine laid down in *Pendleton* v. *Benner Line*, 246 U. S. 353, and *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, that where a shipowner has *himself* signed a private contract of charter party containing an express warranty of seaworthiness, such contract is regarded as "personal" to the owner and he may not limit his liability for any breach of the express warranty of seaworthiness. Three things are necessary in order to make this doctrine available.

(1) The contract must be personally signed by the owner, and

(2) The contract so signed by the owner must contain an express warranty of seaworthiness, and

(3) The loss must be due to unseaworthiness and not fire.

None of the conditions ex sted here.

Petitioners did not contend in the District Court that any of the bills of lading were "personal" contracts. R. 591. In the Circuit Court of Appeals the Petitioners claimed that *only* the bills of lading covering the shipments of Earle & Stoddart, Inc., and Sanday & Co. were "personal" contracts. R. 647. See Point V of Petitioners' Brief in the Circuit Court of Appeals, quoted as Appendix A of this Brief.

There is nothing in the record to support this new theory of the Petitioners.

There were 238 bills of lading covering the shipments. In no case was a bill of lading signed by the Respondent or any of its officers or managers, who were in England. Respondent's freight agent at New York was Ellerman's Wilson Line New York, Inc., a Maryland corporation, who signed 66 of the bills of lading "As Agents." The remaining 172 bills of lading were signed by various railroad agents and steamship companies as initial carriers throughout the United States and elsewhere, and delivered to the shippers at those points. *Infra,* pp. 42, 43, 45.

The doctrine of "personal contract" has never been applied to bills of lading, but has been limited to private charter parties, so far as carriage is concerned. *Infra,* p. 44.

This Court has issued a warning against too liberal an attribution to shipowners of contracts not personally theirs. *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334.

As none of the bills of lading constituted "personal" contracts of the shipowner, the terms of the bills of lading are immaterial under the Limited Liability Statute.

Assuming, which we deny, that any of the bills of lading constituted "personal" contracts, the question remains as to what the contract was in respect to obligations assumed.

This Court has definitely held that only an express contract between the parties waiving the Fire Statute can take a case out of the Statute. *Walker* v. *Transportation Co.*, 3 Wall 150, 154.

The bills of lading did not contain any such contract as the *Walker* case declared was necessary; did not waive the Fire Statute, and did not constitute an agreement by the owner to assume unlimited liabilities. *Infra*, p. 45.

Out of the 238 bills of lading issued, 66 of the bills of lading contained the exceptions clause relied on throughout Petitioners' Brief, which is printed, *infra*, p. 46. This exceptions clause did not contain any express warranty of seaworthiness. *Infra*, pp. 45, 48, 49. It was a denial, not an assumption, of liability.

All of the bills of lading issued contained an express provision incorporating the Fire Statute, which exempts a shipowner for any fire, however and wherever happening, "unless such fire is caused by the design or neglect of such shipowner."

Instead, therefore, of the shipowner having made a contract waiving the Fire Statute, the fact is that the shipowner made an express contract that he should have the benefit of the Fire Statute, and both Courts below so found. R. 591, 647.

This whole point is fully discussed. *Infra*, pp. 42-58.

FIRST POINT.

SECTION I OF THE LIMITED LIABILITY ACT OF MARCH 3, 1851, AS AMENDED, COMMONLY KNOWN AS THE "FIRE STATUTE," CONSTITUTES A COMPLETE DEFENSE TO THE OWNERS OF THE *Galileo* FOR THE NEGLIGENCE OF CHIEF ENGINEER OXTOBY.

R. S. 4282-4287 amending the Limited Liability Act of March 3, 1851, c. 43, 9 Stat. 635, is contained in the United States Code, Title 46, Sections 182 to 187, inclusive. The first and sixth sections provide:

"*Loss by fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner." 46 U. S. C., s. 182.*

"*Remedies reserved.* Nothing in the five preceding sections shall be construed to take away or affect the remedy

---

* This section of the original Limited Liability Act of March 3, 1851 (the Fire Statute), read as follows:

"9 Stat. 635, Ch. XLIII.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: *Provided*, That nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship owners."

It was amended by omitting the proviso when carried into the Revised Statutes.

to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel." 46 U. S. C., s. 187.

The other four sections of the Limited Liability Act of March 3, 1851, 46 U. S. C. ss. 183-186, confer on the shipowner or a bare boat charterer the right to limit his liability for any loss incurred without his privity and knowledge to the value of the interest of such owner in such vessel after the accident and her pending freight.

It will thus be observed that the Limited Liability Act of March 3, 1851, did three things.

First. The statute relieved the shipowner entirely for "any loss or damage" which may happen to any merchandise "shipped, taken in or put on board" any such vessel "by reason or by means of any fire happening" to the vessel "unless such fire is caused by the design or neglect of such owner."

It is difficult to conceive what language could have been employed by Congress to make it clearer that if a fire happens and merchandise is damaged by reason or by means of the fire, the owner is not liable unless such fire is caused by the owner's neglect or design. It is made very clear that it is immaterial how the fire happened unless caused by owner's design or neglect.

Second. The statute conferred upon the shipowner the right in any event to limit his liability for any loss occurring without his privity or knowledge, to the value of his interest in the ship after an accident and the pending freight.

Third. The statute reserved to those suffering injury or damage the right to proceed against the master, officers or seamen whose negligence caused the loss.

In other words, the Limited Liability Act of March 3, 1851, relieved the shipowner from the consequences of imputable negligence for loss or damage *"by reason or by means of any fire"* happening on board and permitted him in any event to limit his liability if the loss was caused without his privity or knowledge.

History of the Statute:

The Limited Liability Act of March 3, 1851, so far as the Fire Statute is concerned, was the result of the decision of the Supreme Court in the case of the *Lexington,* which was burned on Long Island Sound. That case was decided in 1848 (*New Jersey Steam Navigation Co.* v. *Merchants Bank,* 6 How. 344) and subjected the carrier to liability for a loss by fire. *Moore et al.* v. *American Transportation Co.,* 24 How. 1, 38.

In *Moore et al.* v. *American Transportation Co.,* 24 How. 1, at page 39, the Court said:

"The policy and justice of the limitation of the liability of the owners, under this act of 1851, are as applicable to this navigation as to that of the ocean. The act was designed to promote the building of ships, and to encourage persons

engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe. The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master, officers, etc., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight."

In *New Jersey Steam Navigation Co.* v. *Merchants Bank,* 6 How. 344, which decision resulted in the passage of the Fire Statute, a suit was brought to recover for certain specie lost on the *Lexington,* which took fire and was lost on Long Island Sound while on a voyage from New York to Providence. The vessel's machinery had been originally designed to burn wood. Not long before the accident, it had been changed to consume coal, which created a higher heat. There was a neglect to secure the wooden portions of the boat exposed to this higher heat from the natural and dangerous consequences of such heat. Fire brick and sheet iron for guards near the furnace had been omitted, and on two previous occasions shortly before the accident the flue had become so reddened by intense heat as to attract the attention of the crew. For the voyage in question, cotton was stowed within eighteen inches on all sides of the flue, which had become red hot on previous trips, making it difficult to remove the cotton should a fire occur. A fire did occur, the cotton was not removed, and the vessel became a total loss. At page 394 the Court said:

"And from the mode of stowage a fire could hardly be avoided, and was to be expected and guarded against."

There can be no question from an examination of this case that the *Lexington* was unseaworthy before sailing and that the fire took place after the voyage had begun as an inevitable consequence of the prior physical unseaworthiness.

In *Moore et al.* v. *American Trans. Co.*, 24 How. 1, at page 38, Mr. Justice Nelson said:

"The decision in the case of the *Lexington*, which was burned upon Long Island Sound, led to this act of 1851. That case was decided in 1848, subjecting the carrier in case of a loss by fire. (6 How. 344.)"

Mr. Justice Nelson also wrote in the case of the *Lexington, New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344.

The Fire Statute thus represents the deliberate public policy of the United States in respect to fires happening on shipboard "without the design or neglect of the owner", following the fire on the *Lexington*. The purpose of the Act was to encourage shipbuilders and shipowners and to place our law in line with British law on the same subject. The British Fire Statute will be found *infra*, p. 34.

In passing the Harter Act in 1893 Congress expressly stipulated that the Fire Statute should not be held to be modified or repealed, thus reaffirming the policy of the Act of 1851 regarding fires and limitation of liability.

In *Walker* v. *Transportation Co.*, 3 Wall. 150, a cargo of grain owned by Walker & Co. was shipped on a vessel belonging to the Transportation Company, a common carrier. The vessel caught fire through the negligence of some of her officers and the grain was burned up. Walker & Co.

accordingly filed a libel to recover the value of the wheat. The defendant contended that while the wheat was destroyed by fire, the fire was not caused by the "design or neglect" of the shipowner and that consequently he was not liable under the Fire Statute. This defense was excepted to. The exception was overruled. The case was appealed first to the Circuit Court, where evidence was taken which showed the fire was caused by the negligence of the officers of the steamer, and then to the Supreme Court.

The Supreme Court affirmed the decrees and held that the shipowner was not responsible under the Limited Liability Statute for a fire caused by the negligence of the master and officers of the vessel, in whose misconduct the owner did not participate personally.

The opinion of the Court in this case does not show where the fire occurred nor what the negligence of the officers of the ship was which caused the fire. We have, however, examined the record filed in the office of the Clerk of this Court, from which the following facts appear:

The propeller *Falcon* was engaged in trade between Buffalo and Chicago. On October 16, 1856, the *Falcon* was in the Chicago River and took on the libelant's cargo at the libelant's warehouse. On October 17th the *Falcon* left libelant's warehouse and proceeded to the warehouse of Flint & Wheeler, also in the Chicago River, where she loaded more cargo. Then the steamer proceeded to two other places in the Chicago River to take on additional cargo. Late in the afternoon of October 17th the steamer started for the Transportation Company dock at Dearborn Street in order to take on her final cargo before commencing her voyage to Buffalo. Before the steamer could get to this dock and at

about eight o'clock, it became densely dark due to fog and smoke, and the *Falcon* tied up at the dock of Huff & Co. for the night. The safety requirements of the time required that the fires on steamers be wetted down at night. The cause of the fire was that the officers of the ship negligently failed to wet down the fires in the boiler room at night and all went to bed leaving the dangerous fires unattended. The fire thus took place owing to the negligent failure of the officers to wet down the fires and in leaving the vessel with a dangerous condition on board, which subsequently caused a fire to the ship.

This case disposes of any suggestion that an owner's defense under the Fire Statute depends on whether the fire is caused before or after the commencement of the voyage. See also *Moore et al.* v. *American Transportation Co.*, 24 How. 1.

The situation presented in the *Walker* case is identical with that of the *Galileo*. Clearly the vessel was unseaworthy from the moment the crew failed to wet down the fires and left them unattended, thus creating a "fire hazard." Equally clearly the crew of the *Falcon* had not exercised "due diligence."

In the *Walker* case, 3 Wall. 150, at page 153 the Court said:

"It is quite evident that the statute intended to modify the shipowner's common law liability for everything but the act of God and the king's enemies. We think that it goes so far as to relieve the shipowner from liability for loss by fire, to which he has not contributed either by his own design or neglect.

"By the language of the first section the owners are released from liability for loss by fire in all cases not com-

ing within the exception there made. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect.

"When we consider that the object of the act is to limit the liability of *owners* of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners.

"If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the sixth section, which, in terms, saves the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

"We are, therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally" (Italics Court's).

The *Walker* case lays down the definite rule that only an express contract of waiver can take a fire case out of the statute. *Infra*, p. 48.

See also *Norwich Company* v. *Wright*, 80 U. S. 104, and *Keene* v. *The Whistler*, Fed. Cases No. 7,645. The latter case is on all fours with the present case.

In *Craig* v. *Continental Insurance Co.*, 141 U. S. 638, 646, Mr. Justice Blatchford in discussing the case of *Walker* v. *Transportation Company*, 3 Wall. 150, stated (italics ours):

"But it was held by this court in *Walker* v. *Transportation Company*, 3 Wall. 150, in regard to the statute (Act of March 3, 1851, Sec. 1, 9 Stat. 635, now Sec. 4282 of the Revised Statutes) * * * that, *in order to make the owner of a vessel, in case of loss by fire, liable for negligence, it must appear that the owner had directly participated in the negligence.* It was there said that, as the object of the act was 'to limit the liability of *owners* of vessels,' and the exception was not, in terms of negligence generally, but only of negligence of the owners, it would be a wrong construction of the act to hold that the exception extended 'to the officers and crews of the vessels, as representing the owners'; that Sec. 6 of the act (now Sec. 4287 of the Revised Statutes) showed that it was the purpose of the preceding sections to release the owner from some liability for the negligence and fraud of the master and other agents of the owner, for which those persons were themselves liable and were to remain so; and that, in reference to fires occurring on the vessels to which the statute applied, the owner was 'not liable for the misconduct of the officers and mariners of the vessel, in which he does not participate personally.' *The same rule is applicable to the words 'privity or knowledge' in Sec. 4283.*"

In *Providence & N. Y. SS. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, Mr. Justice Bradley said, at pages 588 and 589, with respect to the Limited Liability Act of March 3, 1851:

"If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance: but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate

in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

In holding that Sec. 4283 as well as Sec. 4282 of the Revised Statutes applied to fires, Mr. Justice Bradley said, at pages 602 and 603 (italics ours):

"*In all cases of loss by fire, not falling within the exception, the exemption from liability is total.* But there is no inconsistency or repugnancy in allowing a partial exemption in cases falling within the third section; that is, cases of loss by fire happening without the *privity or knowledge* of the owners. They may not be able, under the first section, to show that it happened without any neglect on their part, or what a jury may hold to be neglect; whilst they may be very confident of showing, under the third section, that it happened without their privity or knowledge. The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different.

"It is true the owners of a ship may desire to contest all liability whatever, as well as to establish a limited liability if they fail in the first defence; and this they may do, as well in cases of loss by fire as in other cases, in one and the same proceeding. And we see no repugnancy between the two defences. One is a more perfect defence than the other, and requires a different class or degree of proofs. That is all."

In *The Republic* (C. C. A. 2nd), 61 Fed. 109, Wallace, C. J., discussing the rule laid down in *Walker* v. *Transportation Company,* said, at page 112:

"Undoubtedly, by our statute, as by the English statutes, the common law liability of the shipowner is not

restricted in cases where his personal neglect has been an inducing cause of the loss. It was the intention of Congress to relieve shipowners from the consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own wilful or negligent acts."

In *The Strathdon* (C. C. A. 2nd), 101 Fed. 600, certain goods were damaged by fire which it was claimed originated from an overheated flue from which the cargo was ignited. The Court below had found that the fire had been thus caused but that the shipowner had not been personally negligent and hence was not liable. The Circuit Court of Appeals held that the burden was on the cargo owner to establish that the flue was overheated and that the fire had originated therefrom, and that the cargo owner had not sustained this burden.

In the course of its opinion the Circuit Court of Appeals stated at page 604 that it concurred in the main with the conclusions of fact found by the District Judge "*and fully with the conclusions of law, set forth in the very thorough and satisfactory opinion of Judge Thomas in deciding the cause*" (Italics ours). Judge Thomas said, 89 Fed. 374, 378:

"From ordinary rules, it is inferred easily that, after the loss has been shown to have arisen from fire, the burden is on those asserting that the fire was caused by the shipowner's design or neglect to prove it, and, indeed, the authorities are to that effect. * * * It is also the rule that the design or neglect of the shipowners, respecting some duty to be fulfilled by themselves, and not by their servants, is involved."

At page 380:

"Negligence may not be inferred, at least in this case, from the ultimate event, but the test is rather, what provision would a very prudent business man, skilled in such affairs, have made under the circumstances, not knowing that this particular fire would occur?"

In concluding its opinion the Circuit Court of Appeals stated (p. 606):

"The occult causes of fire are as numerous as they are mysterious. If the flue was red-hot on the night of the fire, it may or may not have been the producing cause. If, as we think, it was not, there is no satisfactory proof of the origin of the fire."

Harter Act:

There is a vital difference between the Fire Statute, and the later legislation known as the Harter Act.

The Fire Statute, R. S. 4282, became a law on March 3, 1851.

Walker v. *Transportation Co.*, 3 Wall. 150, was decided by the Supreme Court in 1865.

The Harter Act became a law on February 13, 1893.

We have already quoted on page 15 of this brief the text of the Fire Section (R.S. 4282) of the Limited Liability Act of 1851, as amended.

Sections 3 and 6 of the Harter Act read as follows:

"Sec. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held re-

sponsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. (46 U. S. C., s. 192.)

"Sec. 6. *This Act shall not be held to modify or repeal sections 4281, 4282, and 4283 of the Revised Statutes* of the United States, or any other statute defining the liability of vessels, their owners or representatives."

It will be observed that Congress made it a condition to the shipowner's obtaining the benefits of the Harter Act that the owner should exercise due diligence to make the vessel seaworthy.

Congress in passing the Limited Liability Statute imposed no such condition.

It will also be observed that Section 3 of the Harter Act, while enumerating a number of exemptions conditioned on the owner exercising due diligence, makes no mention of fire.

On the contrary, Congress in passing the Harter Act made it clear that the Harter Act was not to modify or repeal Sections 4281, 4282 (the Fire Statute) and 4283 of the Revised Statutes. Section 6 of the Harter Act expressly so provides.

Thus Congress in 1893, with the *Walker* case on the books, reaffirmed its policy with respect to fire and limitation of liability, as expressed in the Statute of 1851.

The owner's defense here is based on the Fire Statute and not on the Harter Act. Therefore cases dealing with and defining implied warranties of seaworthiness and the due diligence required by the Harter Act have no application to this case. The Petitioners, throughout all courts, including this one, have attempted to deal with this case as if the owner were relying on the Harter Act instead of on the Fire Statute. By confusing the Fire Statute and the Harter Act and citing authorities dealing with the latter Act, the Petitioners apparently hope to persuade this Court that the owners were under an obligation to exercise due diligence to make the vessel seaworthy before they were entitled to the benefits conferred on them by the Fire Statute. Both lower courts have avoided the confusion which such practice creates; Judge Swan has warned against it. R. 645.

Notwithstanding the difference in the two statutes pointed out by Judge Swan in his opinion, the Petitioners' position, as we understand it, is that the Limited Liability Act of March 3, 1851, does not relieve a shipowner from liability for fire (R. S. 4282) or permit a shipowner who has not been guilty of privity or knowledge to limit his liability (R. S. 4283-4287) where the vessel is unseaworthy and due diligence has not been exercised to make her seaworthy by one of the crew.

If the Petitioner's position is sound, no innocent owner of an unseaworthy ship, where due diligence to make the vessel seaworthy had not been exercised, could successfully limit his liability to the value of the ship and pending freight after a loss, under R. S. 4283-4287, even where the owner had not been guilty of any privity or knowledge.

The authorities are uniformly and overwhelmingly against the Petitioners on this contention.

Moore et al. v. *American Transportation Co.*, 24 How. 1;
Quinlan v. *Pew*, 56 Fed. 111 (C. C. A., 1st);
The Annie Faxon, 75 Fed. 312 (C. C. A. 9th);
The Colima, 82 Fed. 665 (S. D. N. Y.);
The Jane Gray, 99 Fed. 582 (D. C. Wash.);
The Tommy, 151 Fed. 570 (C. C. A. 2nd);
The Richard F. Young, 245 Fed. 499 (E. D. Va.);
The Erie Lighter 108, 250 Fed. 490 (D. C. N. J.);
Patton-Tully Transp. Co. v. *Turner*, 269 Fed. 334 (C. C. A. 6th);
Hines v. *Butler*, 278 Fed. 877 (C. C. A. 4), affirming 264 Fed. 986, Certiorari denied 257 U. S. 659;
Pocomoke Guano Co. v. *Eastern Transp. Co.*, 278 Fed. 745 (D. C. Md.), affirmed 285 Fed. 7 (C. C. A. 4th);
Kitsap County Transp. Co. v. *Harvey*, 15 F. (2d) 166 (C. C. A. 9th);
Craig v. *Continental Ins. Co.*, 141 U. S. 638;
Ingram & Royle v. *Services Maritimes du Treport Limited*, (1914), 1 K. B. 541;
American-Hawaiian S.S. Co. v. *Pacific S.S. Co.*, 41 F. (2d) 718 (C. C. A. 9th).

The Petitioners in effect ask this Court to read into each section of the Limited Liability Act of 1851, as amended, the following words not now in the statute:

"provided the ship is seaworthy or the shipowner and his servants have exercised due diligence to make the vessel seaworthy."

There is no such provision in the fire section of the Limited Liability Act or in any other section, and the Courts have refused to legislate such a provision into the statute. The Congress itself in enacting the Harter Act requiring due diligence in certain cases, took particular care to provide expressly that the Harter Act should not affect the Fire Statute or the owner's right to limit liability.

Hines v. *Butler,* 264 Fed. 986, shows that even an owner who has been personally negligent in connection with a fire may nevertheless limit his liability under R. S. 4283-4287, where his conduct does not amount to privity and knowledge. See also *Providence & N. Y. SS. Co.* v. *Hill,* 109 U. S. 578, 602, 603.

The *Galileo* was unseaworthy here because of Chief Engineer Oxtoby's negligence in loading new coal on heated coals already in the steamer. In precisely the same way, the Propeller *Falcon* in *Walker* v. *Transporation Co.,* 3 Wall. 150, discussed at page 19 of this Brief, was also unseaworthy because of the neglect of the crew in allowing the fires to burn during the night while the propeller was lying at the wharf, and in leaving these dangerous fires burning without anybody to watch them. In each case the members of the crew created a fire hazard which resulted in a fire to the ship. And in each case there was no neglect on the part of the owner.

To reverse this case this Court would have to disregard entirely its decision in the *Walker* case, which has stood unchallenged since 1865.

The *Walker* case shows clearly that neither actual seaworthiness of the vessel nor due diligence is a condition precedent to the benefit of the Fire Statute, and that the

owner is entitled to exemption from liability for every loss by fire to which his design or neglect has not contributed.

Furthermore, the owner is entitled to limit his liability if he has not been guilty of privity and knowledge, irrespective of seaworthiness or the diligence of his servants.

At page 153 the Court said in *Walker* v. *Transportation Co.*, 3 Wall. 150:

"By the language of the first section the owners are released from liability for loss by fire in *all* cases not coming *within the exception there made.* The exception is of cases where the fire can be charged to the owners' design, or the owners' nelgect." (Italics ours.)

This Court, therefore, in the *Walker* case specifically rejected the contention here made that a dangerous fire left on board a vessel through the negligence of the officers before the commencement of the voyage, and which causes the loss of the vessel, deprives the owner of the benefit of Section 1 of the Limited Liability Act of 1851, the so-called Fire Statute.

The Petitioners have printed in their brief long extracts from opinions in cases involving the Harter Act, without pointing out to the Court the vital difference between the two statutes. In view of the difference between the two statutes, these Harter Act cases have no application to the present controversy.

The only case which, even on a most optimistic construction, could be said to be an authority for the Petitioners' contention with respect to the Limited Liability Act of March 3, 1851, is the case of *The Etna Maru,* 20 F. (2d) 143 (D. C. Texas), affirmed 33 F. (2d) 232, on another ground.

There was a libel *in rem* by the cargo interests against the steamer *Etna Maru*. In the District Court it appeared that the owners of the steamer had personally signed a private charter party containing an express warranty of seaworthiness. It further appeared that there was a *physical defect in the steamer itself*, which made the steamer unseaworthy.

The case was tried before Judge Hutcheson in the Southern District of Texas.

The District Court held that the owners had a non-delegable duty of furnishing a seaworthy ship, both by an express personal contract and as a matter of general law. The express personal contract signed by the owners was enough to dispose of the case.

But disregarding all the authorities on the subject of the Limited Liability Act, the District Court delivered the following dictum with respect to the Limited Liability Act, R. S. 4282-4287 (146):

"• • • that the right to limitation or exemption is to be sought in the whole text of the acts, [R. S. 4282-4287] and that they plainly mean to say that the owner may have limitation or protection against the acts of the officers of the ship, the master, and of the crew, who are in charge of and navigating his ship on her voyage, but that the owner is responsible for the proper discharge of those duties with reference to seaworthiness before the beginning of a voyage, which are properly chargeable as non-delegable duties to the owner, whether he undertakes personally to discharge them or delegates them to others."

This view of the law, of course, would deprive any shipowner of the right to limit liability even where he had been guilty of no privity or knowledge, if the ship was unsea-

worthy and due diligence had not been exercised by some of the crew to make her seaworthy.

Such is not the law by overwhelming authority. The exact contrary has been held by this Court in many cases. *Supra*, p. 29.

The case of the *Etna Maru* was appealed to the Circuit Court of Appeals for the Fifth Circuit, 33 F. (2d) 232, where the Court reached the extraordinary decision that the Limited Liability Act of 1851 *did not apply at all*, because the action was *in rem* against the steamer and not *in personam* against the owners. The Court thought that the Limited Liability Act only relieved the *owners* personally, and not the *ship*. This particular point had not even been suggested by counsel.

In the Circuit Court of Appeals the Court stated (33 F. (2d) at page 234):*

"The conclusion we reach is that, regardless of whether appellant is bound by the expressed warranty of the charter to the extent that it may not limit its liability at all, or whether it has been guilty of negligence personally, it is certain that the unseaworthiness of the vessel at the beginning of the voyage amounted to negligence of either itself or its employees. There is nothing in the statute to bar a recovery against the *ship*." (Italics ours.)

In other words, the Circuit Court of Appeals for the Fifth Circuit considered that the Limited Liability Act, including the Fire Statute, only relieved *shipowners* and did not constitute a defense in an action *in rem* against the *ship*. This was the "other ground" referred to by Judge Swan. R. 646.

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* A similar extract from the Court's opinion on page 18 of Petitioners' Brief by starting in the middle of the sentence gives a wholly erroneous impression of what the Court said.

The case before this Court involves the question of whether the Fire Statute is a defense to the *shipowner* and not whether the Fire Statute constitutes a defense to the *ship,* which was the question decided in the *Etna Maru* in the Circuit Court of Appeals.

The Circuit Court of Appeals in the *Etna Maru* was, of course, clearly wrong in holding that the Limited Liability Statute relieved only the owner, but not the ship. *Liverpool, etc., Nav. Co.* v. *Brooklyn Terminal,* 251 U. S. 48, 52, 53. See Petitioners' attempt to explain the matter on page 19 of their Brief.

The British Fire Statute and the Canadian Carriage of Goods Act:*

The British Fire Statute (Sec. 502, par. (i) of the British Merchant Shipping Act, 1894, 57 and 58 Vict., c. 60) is practically identical with the American Fire Statute. It reads:

"The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:

"(i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

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* The first English Fire Statute was 7 Geo. II, Chap. 15 (1734); the next was 26 Geo. III, Chap. 86 (1786), on which our Act was modeled. *Norwich Co.* v. *Wright,* 80 U. S. 104, 117.

The Merchant Shipping Act 1854, Section 502, changed the form of the Act somewhat and put in the words "actual fault or privity."

The Act of 1894 above quoted was merely a Consolidating Statute.

The American Fire Statute was enacted to make our law the same as that of England. *Moore et al.* v. *American Transportation Co.*, 24 How. 1, 39.

Under British law it is well established that an owner of an unseaworthy vessel, in case of a fire occurring without his actual fault or privity, is not liable for the loss. *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (1912), 1 K. B. 229; *Ingram & Royle Limited* v. *Services Maritimes du Treport, Limited*, (1914) 1 K. B. 541; *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*, House of Lords, (1931) A. C. 726.

The English Courts have pointed out that if an owner of an unseaworthy ship who was not guilty of fault and privity was to be liable for a fire, it would require reading the word "seaworthy" into the British Fire Statute. The House of Lords pointed out in the *Tempus* case, *supra*, that the British law had been settled for many years. What the Petitioners seek here is to import the word "seaworthy" into the American Fire Statute.

It would be most unfortunate to upset the uniformity of British and American law on this point. *Queens Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487.

Especially is this true when, as this Court pointed out in *Moore et al.* v. *American Transportation Co.*, 24 How. 1, at page 39 (italics ours),

"The act [Limited Liability Act of 1851] was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, *and to place that of this country upon a footing with England and on the continent of Europe.* The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master,

officers, &c., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight."

The *Canadian Water Carriage of Goods Act,* which is the equivalent of our Harter Act and not our Limited Liability Act, as stated by Petitioners, is printed as Appendix C. This statute is wholly dissimilar to the American *Limited Liability* Act of March 3, 1851. Like our Harter Act, it requires a shipowner to exercise due diligence to properly man, equip and supply the ship, and to make and keep the ship seaworthy. Provided the shipowner has exercised due diligence to make and keep the vessel seaworthy, by paragraph 7 of the Act the shipowner is not liable for loss arising from *fire,* danger of the sea and other navigable waters, acts of God, public enemies, etc., "arising without their [the shipowners'] actual fault or privity or *without the fault or neglect of their agents, servants or employees.*" The Canadian Act requires not only due diligence, but makes the owner responsible for the faults of his servants. Such an Act has no bearing on the present case.

Section 7 of the Canadian Act is based on the last half of Section 3 of the Harter Act, *but* the Canadian Act adds "*fire*" to the list of perils as set forth in that portion of the Harter Act.

The mere reading of the Canadian statute, shows that the Canadian statute affords no help in arriving at a proper solution of this case under the Limited Liability Act of March 3, 1851, which, like the English statute, has no requirement of due diligence. See *Royal Exchange Assurance* v. *Kingsley Navigation Co.* (1923), A. C. 235.

The Decision in The Malcolm Baxter, Jr., 277 U. S. 323:

Throughout their brief the statement is repeatedly made by the Petitioners that the case of *The Malcolm Baxter, Jr.*, 277 U. S. 323, is authority for the proposition that unless the owner of an unseaworthy vessel and all his servants have exercised due diligence to ascertain and remedy the ship's condition before sailing, the owner will be denied exoneration and limitation of liability under the Limitation of Liability Act of March 3, 1851. The statement is categorically made many times by Petitioners that it is immaterial under the Fire Section that the owner has not been guilty of any personal neglect or design or that the owner has not been guilty of privity and knowledge, as required by R. S. 4282-4287. Petitioners assert that unseaworthiness deprives the owner of the benefit of the statute if either the owner or any of his servants, including the crew, have not exercised due diligence.

In other words, the Petitioners' position is that the owner of a vessel, who has been guilty of no fault or design, is not relieved from liability for a fire unless both he and all his servants have exercised due diligence to make the vessel seaworthy on sailing, and that, similarly, an owner cannot limit his liability to the value of the ship and freight following a disaster even though he is without privity or knowledge, unless he and his servants have exercised due diligence to make the vessel seaworthy on sailing. This extraordinary contention in the very teeth of the statute is, of course, contrary to numerous decisions of this Court and of the Courts of the various Circuits, *supra*, p. 29.

It results from a complete misconception of what this Court decided in *The Malcolm Baxter, Jr.*, 277 U. S. 323. To support their contention the Petitioners have seized upon the following excerpt from Justice Stone's opinion (331):

"Both courts below agreed that the *Baxter* was unseaworthy on sailing and that *respondent* [the owner] failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, C. 105, 27 Stat. 445, and Acts permitting Limitation of Liability to the vessel and pending freight. R. S., Secs. 4282-4289 * * *." (Italics ours.)

The language of the foregoing quotation is lifted out of the context of the opinion and put forward without any adequate statement of the facts of the case on which the statement was predicated and without pointing out that the Court expressly stated it was making no determination on the point.

The facts in the *Baxter* case are not detailed in this Court's opinion because not involved here. This Court assumed the correctness of the finding by both Courts below of the personal negligence of the *respondent*, the vessel owner. An examination of the opinion when this case was before the District Court (55 F. (2d) 312) discloses that the owner had purchased the ship after she commenced loading for a voyage, without any previous knowledge of the ship; that the vessel's hull had serious physical defects which an inspection would have disclosed, but that the owner did not provide a suitable person to inspect the vessel, which he had purchased without any waranty of seaworthiness. The owner neither looked at the ship himself nor dele-

gated to any competent person the duty of looking at the ship for him. Moreover, it clearly appears from the opinion of Judge Knox in the District Court that a leak developed before the *Baxter* was called upon to do more than be towed out in the river to Port Eads. In his opinion in the District Court (55 F. (2d) 312) at page 316, Judge Knox stated:

"While lying there [Port Eads] her captain wrote his owners that they need not be surprised if he turned up in a Gulf port."

Thus the record in the *Baxter* case clearly showed actual notice brought home to the owner in writing that the vessel was unseaworthy. The owner did nothing even after due notice of trouble, and for this he was properly condemned.

What the District Court, the Circuit Court of Appeals and this Court held in the *Baxter* case was that the personal actions of the owner of the ship were so improper and in such complete disregard of every usual safeguard that his actions amounted in law to guilty privity and knowledge required by R. S. 4283. In other words, they held that a shipowner cannot close his eyes, make no inspection himself, refuse to delegate the duty of a technical inspection to some competent person and in fact do nothing after receiving a letter from his captain that something is radically wrong with his ship. It is obvious from reading the decision of Judge Knox in the District Court, the decision of the Circuit Court of Appeals and the decision of this Court that the lack of diligence that Mr. Justice Stone was talking about in his opinion in a non-technical sense was the personal conduct and personal knowledge of the owner in the *Malcolm Baxter* case which amounted in law to the privity and knowledge required by the Statute. R. S. 4283.

Concededly, the owners of the *Galileo*, domiciled in England, knew nothing of the heated coals nor of Oxtoby's negligence and had no notice that anything was wrong with the ship, as was the case in the *Malcolm Baxter*. There were no physical defects in the *Galileo*. The sole trouble was Oxtoby's handling of the coal.

The owners of the *Galileo* had appointed a competent chief engineer to supervise the coal. Such supervision is a usual and simple duty of a chief engineer. *Walker* v. *Transportation Co.*, 3 Wall. 150. No special skill was required for such a routine matter, as Petitioners admit in their Brief, p. 40. The owner, therefore, selected a competent person to perform a usual and simple duty. The failure of the chief engineer to perform his simple duty caused the loss, but such loss is not chargeable to the owner of the *Galileo* under the Fire Statute.

There is nothing in the report of the Supreme Court in the *Malcolm Baxter* case nor in the reports of the Courts below to justify the Petitioners' contention that the words "privity and knowledge" in the Limited Liability Statute of March 3, 1851, have now been removed by judicial legislation. *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502.

Without laboring this question unduly, it should be sufficient to point out that since 1851 in all the cases where a shipowner has been held liable for a fire there has been a finding by the Court of the *shipowner's personal neglect* as a cause of the fire.

Arkell & Douglas v. *United States* (C. C. A., 2nd), 13 F. (2d) 555;

The Elizabeth Dantzler (E. D. Va.), 263 Fed. 596;

Bank Line v. *Porter* (C. C. A., 4th), 25 F. (2d) 843;

Charbonnier v. *United States,* 45 F. (2d) 166;
affirmed (C. C. A. 4) 45 F. (2d) 174;
Willfaro-Willsolo (C. C. A., 9th), 9 F. (2d) 622.

The case of *Arkell & Douglas* v. *United States, supra,* is a typical illustration of a case where the shipowner was held liable for his own personal neglect. In that case the shipowner himself, having been warned that certain bunker coals were heated, over the protest of the officers and engineers of the ship, insisted on loading further coal on top of the heated coals, with the result that a fire was caused. In other words, the shipowners themselves did almost precisely what Oxtoby did here. At page 558 the Court said (italics ours):

"The appellant has established that the fire was due to failure to shift the coal;* it has established negligence by showing a failure on the part of the appellee to shift the coal as the custom and practice dictated. The libelant has assumed the burden, and sustained it, of establishing the cause of the fire and resulting damage. It has brought home *knowledge and privity* to the owner of the vessel; at least, knowledge of the higher representatives of the owners, which forbids appellee being released from responsibility under section 4282 and 4283 of the Revised Statutes. *Craig* v. *Continental Ins. Co.,* 141 U. S. 638."

There is no suggestion in the record that the owner's freight agent at New York was guilty of "design or neglect." The cases cited at p. 61 of Petitioners' Brief are not authority for the proposition that the "knowledge and privity" of such a freight agent, even if there was any, would be the "privity and knowledge" of the owner. The cases cited have no application to the facts here.

*Which was hot.

SECOND POINT.

THE RESPONDENT DID NOT MAKE ANY "PERSONAL" OR OTHER CONTRACT WITH THE PETITIONERS CONTAINING AN EXPRESS WARRANTY OF SEAWORTHINESS AND DID NOT WAIVE THE FIRE STATUTE OR CONTRACT ITSELF INTO AN UNLIMITED LIABILITY.

At page 58 of Petitioners' Brief appears the following statement:

"In the present case, the respondent personally, through its duly authorized managing agents at New York, promised and warranted in the contracts of affreightment that the *'Galileo'* would in fact be seaworthy at the time of sailing from the loading port, New York, so far as the exercise of ordinary care could make her so. The mere breach of that personal contract, therefore, constituted neglect of the respondent corporation personally, depriving it of the benefit of the Limitation Act in 1851, of which the so-called Fire Statute is a section."

The above statement is inaccurate in every particular.

1. *The Respondent made no "personal" contract with the Petitioners. Respondent had no "managing agents" at New York.*

There were 238 bills of lading covering the shipments in this case. These bills of lading were on 18 different forms.

In no case was the bill of lading signed by the Respondent or by any of its officers or managers. They were all in England. The Respondent's freight agent at New York was Ellerman's Wilson Line New York, Inc., a Maryland corporation. The freight agent's duty was to solicit cargo. R. 335. There is no justification in the Record for calling it a "manager."

The following is a list of the bills of lading, the name of the company issuing the bill of lading, and the number of bills of lading signed by each:

Exhibit Attached to Libel	*Name of Company*	*Number of Bills of Lading Issued*
A	Ellerman's Wilson Line New York, Inc., As Agents	50
B	The Cleveland, Cincinnati, Chicago & St. Louis Railway Co.	92
C	American-Hawaiian Steamship Co.	46
D	American-Hawaiian Steamship Co. (dated at Liverpool)	1
E	The Cincinnati, Indianapolis & Western Railroad Company	4
F	Wilson Furness Line	15
G	New York and Cuba Mail Steamship Co.	1
H	Matson Navigation Company	1
I	The Chicago, Rock Island & Pacific Railway Company	10
J	The Chicago and North Western Railway Company	3
K	Chicago, Milwaukee & St. Paul Railway	5
L	The Chicago and Alton Railroad Company	1
M	Chicago Great Western Railroad Company	3
N	The New York Central Railroad Company	1
O	The Baltimore and Ohio Railroad Company	2
P	Caldwell & Company, Inc.	1
Q	Ellerman's Phoenix Line	1
R	Wabash Railway Company	1

In the District Court Petitioners made no claim that any "personal" contracts were involved. R. 591.

In the Circuit Court of Appeals Petitioners did not claim that any of the bills of lading other than those signed by Ellerman's Wilson Line New York, Inc., As Agents (the Earle & Stoddart, Inc., and Sanday & Co., Inc., bills of lading) were "personal" contracts of the Respondent. We attach hereto as Appendix A, Point V of Petitioners' Brief in the Circuit Court of Appeals showing exactly what Petitioners there contended.

See also the Opinion of the Circuit Court of Appeals on this point. R. 647.

Obviously, bills of lading signed by the various railroad agents and other steamship companies at various points in the United States on through shipments which the *Galileo* merely carried forward as a connecting common carrier, could not be the "personal" contracts of the Respondent. Petitioners do not state why they have altered their position taken below and now contend that bills of lading issued by initial carriers and other freight agents should be held to be the "personal" contracts of the connecting carrier.

The doctrine of *"personal contract containing an express warranty of seaworthiness"* has no application to bills of lading of a common carrier, which are regarded as ship's documents. The doctrine, so far as carriage is concerned, has been applied only to private charter parties actually signed or entered into by the owner himself. *Pendleton* v. *Benner Line*, 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139; *Successors De Esmoris & Co.* v. *Whitney & Bodden Shipping Co., Inc.*, 39 F. (2d) 191.

The doctrine, after being developed in *Pendleton* v. *Benner Line, supra,* and *Luckenbach* v. *McCahan Sugar Co., supra,* was definitely limited by this Court in *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334.

If the bills of lading here were the "personal" contracts of the owner, then every shipment on a common carrier by sea is the "personal" contract of the owner of the ship. There is no case in the books that we can find, and Petitioners have cited none, which holds that a bill of lading of a common carrier is a "personal" contract.

In *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334, this Court said:

"We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

As none of the bills of lading constituted "personal" contracts of the shipowner, the terms of the bills of lading are immaterial under the Limited Liability Statute.

Even assuming that any of the bills of lading constituted "personal" contracts, which we vigorously deny, the necessity still remains, as Judge Swan pointed out in the Circuit Court of Appeals, of determining what the contract was in respect to obligations assumed. *The Yungay,* 58 F. (2d) 352; *The Salvore,* 52 F. (2d) 278.

2. *The bills of lading did not contain any express warranty of seaworthiness, did not waive the Fire Statute, and did not constitute a contract by the owner to assume unlimited liabilities.*

As stated previously, there were 238 bills of lading issued in connection with the *Galileo* shipments. These bills of lading were on 18 different forms. Each of these bills of lading expressly incorporated the Fire Statute. Attached hereto as Appendix B is a statement showing the clause in each bill of lading which incorporated the Fire Statute.

Out of the 238 bills of lading issued, 66 bills of lading contained the following exceptions clause to which reference is made throughout Petitioner's Brief (material parts are in capitals):

"IT IS MUTUALLY AGREED * * *; THAT THE CARRIER SHALL NOT BE LIABLE, as carrier or otherwise, FOR ANY LOSS, DAMAGE, DELAY OF DEFAULT, whether occurring during transit or before, or after or during or while waiting loading, transshipment, discharge, delivery or other disposition of the goods, or on board, or in lighters or craft, or on wharf or in warehouse, at any port or place, OCCASIONED BY ANY OF THE FOLLOWING EXCEPTED CAUSES, THROUGHOUT THIS CONTRACT ALWAYS EXCEPTED; By perils of the sea or other waters, BY FIRE OR FLOOD, FROM ANY CAUSE OR WHERESOEVER OCCURRING; by barratry of the master or crew; by enemies, pirates or robbers; theft or pilferage on board, in craft, or on shore: by arrest or restraint of princes, rulers or people, riots, strikes, lockout, stoppage of labor, labor disputes or labor disturbances of any kind, or by any reasonable course of action adopted by the Shipowner or other person whomsoever in contemplation or consequence thereof or in connection therewith; BY EXPLOSION, BURSTING OF BOILERS, BREAKAGE OF SHAFTS, OF ANY LATENT DEFECT IN HULL, MACHINERY OR APPURTENANCES, OR UNSEAWORTHINESS OF THE STEAMER, WHETHER EXISTING AT TIME OF SHIPMENT, OR AT THE

BEGINNING OF THE VOYAGE, PROVIDED THE OWNERS HAVE EXERCISED DUE DILIGENCE TO MAKE THE STEAMER SEAWORTHY; by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage. breakage, chafage, vermin, or by explosion of any goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods, the insufficiency of packages, or from the carriage of livestock and/or cargo on deck; nor for inland damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight and value. * * *"

"IT IS ALSO MUTUALLY AGREED THAT THIS SHIPMENT IS SUBJECT TO ALL THE TERMS AND PROVISIONS OF, AND ALL THE EXEMPTIONS FROM LIABILITY, CONTAINED IN THE ACT OF CONGRESS OF THE UNITED STATES, APPROVED ON THE 13TH DAY OF FEBRUARY, 1893, AND ENTITLED AN 'ACT RELATING TO THE NAVIGATION OF VESSELS,' ETC., AND TO SECTIONS 4281 AND 4287, EACH INCLUSIVE, OF THE UNITED STATES STATUTES."*

In the remaining 172 bills of lading covering the other shipments, the last clause above quoted, with some individual variations, reads as follows (See Appendix B):

"This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

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* The suggestion that the words "Sections 4281 and 4287, *each inclusive*" do not embrace the intervening sections, and that the words "United States Statutes" do not refer to the Revised Statutes. is obviously without merit.

Sections 4282 to 4287 of the Revised Statutes of the United States comprise the Limited Liability Act of March 3, 1851, as amended.

Section 4282 of the Revised Statutes, which is expressly incorporated in all the forms of the bills of lading involved in this case, reads as follows:

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

The precise meaning and effect of this language has been determined by this Court in *Walker* v. *Transportation Co.*, 3 Wall. 150, where it was pointed out that only an express contract to be responsible for fire could take the case out of the Statute.

In the *Walker* case this Court declined to recognize as taking the case out of the Statute, a contract in a bill of lading admitted by the shipowner, to the effect that he would be liable for a fire if caused by the neglect of his servants. See 3 Wall. 150, at page 154.

In the case at bar the shipowner instead of having contracted to waive the benefits of the fire section of the Limited Liability Act, actually made an express contract that he should have the benefit of the Fire Statute, and both Courts below so found.

In reading the exceptions clause quoted on page 46, *supra,* from the bills of lading it will be observed that this clause by no species of distortion could be said to contain an express warranty of seaworthiness. The clause is just

what it purports to be, an exceptions clause. It is a denial, not an assumption, of various liabilities.

It provides in substance that the carrier shall not be liable for any loss, damage or delay "occasioned by *any* of the following excepted causes." The clause then proceeds to enumerate the various different exceptions. The particular exception in the clause which the Petitioners try to construe as an express warranty against unseaworthiness due to fire reads as follows:

"* * *; by explosion, bursting of boilers, breakage of shafts, of any latent defect in hull, machinery or appurtenances, or unseaworthiness of the steamer, whether existing at the time of shipment or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy; * * *"

Nowhere in that part of the exceptions clause just quoted is there any warranty of seaworthiness. It merely constitutes one of the exceptions which would free the owner of liability if the owner could bring itself within the particular exception.

The particular exception does not deal with fire, which is dealt with in two other parts of the bill of lading.

The owner is not relying on this particular exception, which is a good exception under the Harter Act, where, as pointed out on page 27 of this Brief, "due diligence to make the vessel seaworthy" is required as a condition precedent to relief thereunder, which condition the Fire Statute does not require.

Furthermore, the part of the exceptions clause above quoted obviously deals only with the *physical* condition of

the ship in the particulars there stated, and the unseaworthiness of the steamer therein referred to, following the rule of *ejusdem generis,* is limited to the character of things therein specified, to-wit: explosions, bursting of boilers, breakage of shafts, latent defects in hull, machinery and appurtenances. The particular clause has nothing to do with fire and would constitute no defense to an owner who sought an exemption for fire in reliance on its terms. The owner's defense to fire is found in the Fire Statute representing the fundamental law of the land.

The obvious purpose of an exceptions clause is to specify the several different circumstances under which the owner is not liable. The clause provides against liability "occasioned by *any* of the following excepted causes." Because the owner is not relieved under one exception, it does not follow the owner is not freed if he brings himself within another exception which is applicable. The clause does not purport to be, and does not in fact constitute, a contract of express warranty of seaworthiness. It is a denial, not an assumption, of liability.

If the exceptions clause stood alone, we do not think that the construction contended for by the Petitioners could be a possible interpretation. The *Galileo* bills of lading, however, do not stop there. The bills of lading each contain a clause reading, with slight variations, substantially as follows (See Appendix B):

"This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

The clause just quoted, incorporating in the *Galileo* bills of lading, among others, Section 4282 of the Revised Statutes, was the equivalent of saying,

"The shipowner shall not be liable for fire unless caused by the shipowner's personal design or neglect."

In light of the *Walker* case, 3 Wall. 150, how can anyone reasonably contend the owner has made an express contract taking the case out of the Statute?

It must be borne in mind that the Petitioners are contending under this point that the shipowner made an express "personal" contract in the bills of lading, waiving the provisions of Sections 4281-4287, inclusive, of the Revised Statutes, and that the shipowner by an express "personal" contract in the bills of lading agreed that he should not have the benefit of the exemptions contained in the Limited Liability Act, including, of course, the right to limit liability.

This is not a case where the language of some exception is to be construed against the shipowner because of ambiguity; there is no ambiguity. This is a case where it is contended that the shipowner has made an express "personal" contract waiving his statutory right to limit liability. To impose such an extraordinary and unusual contract on a shipowner, there should be a clear indication in the documents supposed to contain such a contract that the shipowner intended to waive the exemptions of a statute passed for his benefit and to assume unlimited liability. *Walker* v. *Transportation Co.*, 3 Wall. 150. There is no suggestion that the Respondent received any special consideration for assuming this extraordinary liability. Admittedly the bills of lading were the usual and customary forms used as a matter of routine by various carriers throughout the United States. There is no suggestion in the Record that the

shippers contracted for or expected such special consideration as the waiver of a fundamental law.

How can it be seriously contended here that the shipowner made a contract waiving his statutory rights, when the very contract claimed to be the waiver contains an express provision that the shipowner shall have the benefit of the statute?

In *The Poleric*, 17 F. (2d) 513, affirmed 25 F. (2d) 843, the exceptions clause, after enumerating the various exceptions, *including fire*, ended with the following provision:

"and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage."

The clause just referred to in the *Poleric* bill of lading was held to constitute a waiver of the Fire Statute.

The bills of lading in the *Galileo* contained no such provision as that just quoted from the *Poleric* case, but on the contrary, contained an express provision that the shipowner should have the benefit of Section 4282 of the Limited Liability Act.

A comprehensive discussion of the fire section of the Limited Liability Act, R. S. 4282, and whether or not it has been waived by the provisions of a bill of lading, is to be found in the decision of the Appellate Division of the New York Supreme Court in *D'Utassy* v. *Mallory Steamship Co.*, 1914, 162 App. Div. 410, affirmed by the New York Court of Appeals, 1918, 223 N. Y. 592, without opinion.

That case was an action to recover damages caused by fire to a consignment of cotton on one of the defendant's lighters in the Port of New York while being transferred from defendant's steamer to the vessel of a connecting carrier. The defendant or carrier had pleaded the entire bill

of lading and had alleged that the fire happened without design or neglect on its part.

The opinion of the Court by Laughlin, J., states, p. 412:

"The question presented for decision is whether, by the express terms of the bill of lading, the provisions of section 4282 of the Revised Statutes of the United States have been waived by the carrier. That section provides as follows:

" 'No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.'

"These provisions were originally enacted in substantially the same form in the Act of Congress of March 3, 1851 (9 U. S. Stat. at Large, 635, chap. 43, §1), which was an act relating to the limitation of the liability of shipowners. As originally enacted, it contained a provision as follows: 'That nothing in this act contained shall prevent the parties from making such contract as they please extending or limiting the liability of shipowners'; but by the subsequent revision that sentence has been omitted. * * * It is quite plain, therefore, that by virtue of the provisions of said section 4282 of the Revised Statutes of the United States the defendant would not be liable. These statutory provisions were enacted to encourage shipbuilding (*Richardson* v. *Harmon*, 222 U. S. 96); but it is, of course, competent for a carrier to waive the statutory immunity and to extend its liability (Abbot Shipping [14th ed.] 1048; Carver Carriage by Sea [5th ed.] 36; *Matter of New York, L. & W. R. R. Co.*, 98 N. Y. 447; *Virginia Carolina Chemical Co.* v. *Norfolk & North American S. S. Co.*, L. R. [1912] 1 K. B. Div. 229). The question here is whether defendant has done so."

P. 415. "It is contended by the learned counsel for the respondent that the bill of lading should be construed strictly against the carrier. That is the ordinary rule where exemption is claimed by the carrier on the contract evidenced by the bill of lading prepared by it which the shipper is obliged to accept; but I think it is not applicable here, where there is a statutory exemption and it is attempted to hold the carrier on the theory that it has, by the bill of lading, *waived its statutory exemption.* Although the bill of lading was issued by the initial carrier, the intermediate carrier is undoubtedly bound by its provisions; but the construction of the contract is to be governed by the ordinary rules of construction with reference to the intention of the parties, and it should not be inferred, I think, that the statutory exemption from liability, which the shipper and the carrier are presumed to have known, has been waived, unless the bill of lading contains a provision on the same subject and as broad as and different from the statutory provisions, or otherwise clearly shows an intention to waive such exemption. (See *Hoffmans,* 171 Fed. Rep. 455; *The St. Cuthbert,* 97 *id.* 340; *Matter of Old Dominion S. S. Co.,* 115 *id.* 845; *Houston Direct Navigation Co.* v. *Ins. Co. of N. America,* 89 Tex. 1; *Virginia Carolina Chemical Co.* v. *Norfolk & North America S. S. Co. supra; Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578.)

The rule announced by the Appellate Division of the New York Supreme Court, approved by the New York Court of Appeals, 223 N. Y. 592, and supported by the various cases cited by the Appellate Division represents the law in this country and sets forth a sensible standard by which to determine whether or not a statutory exemption is waived by an express provision in a bill of lading.

The standard is, that it should not be inferred that the statutory exemption from liability has been waived unless the bill of lading contains a provision on the same subject

and is as broad as and different from the statutory provisions or otherwise clearly shows an intention to waive such exemption.

The Strathdon, 1898, 89 Fed. 374, affirmed 1900, 101 Fed. 600 (C. C. A. 2nd), is a direct authority against the petitioners' suggestion of waiver. In that case the *Strathdon* sailed from Java to New York with a full cargo of sugar, which was carried under a charter party and bills of lading which incorporated the terms of the charter party. The latter provided that the carrier should not be liable for loss or damage,

"occasioned by causes beyond its control; by the perils of the sea or other waters; by fire from any cause and wheresoever occurring; by collision, stranding, or other accidents of navigation of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, *not resulting, however, from any carelessness or want of diligence by the owners of the ship, or any of them, or by the ship's husband or master*" (italics ours).

The libel for damage to cargo was dismissed, 1898, 89 Fed. 374. The decision of the District Court was affirmed by the Court of Appeals for the Second Circuit, 1900, 101 Fed. 600.

The Court said with respect to the conclusion by the District Court that the shipowner was not liable because of the fire, p. 603:

"This conclusion proceeded upon the ground that the shipowners were exonerated from liability by the statutes relieving them from liability for losses caused by fire occurring by the default of their servants without their own neglect; * * *."

The Strathdon would be strong authority against the Petitioners' position even if the *Galileo* bills of lading had not contained an express provision incorporating Sections 4281-4287 of the Revised Statutes.

In the case of *The Hoffmans,* 1909, 171 Fed. 455, the Court dealt with a claim for loss of twine through fire on a railroad company's barge. The question arose under a petition for limitation of liability. One of the points discussed was the contention of the shipper that the railroad company by the bills of lading waived its right to limitation of liability. One clause of the bill of lading provided:

"No carrier * * * shall be liable for any loss * * * by fire."

Judge Adams, said, p. 463:

"There does not appear to be any evidence of an intention on the part of the carrier to waive anything secured to it by agreement or by law. The case of *The Satanita,* 1897, A. C. 59, is however, relied on by the exceptant."

The Court discussed that case and then said:

"Clearly that case is not an authority for the proposition that the railroad has by its bill of lading waived the right to resort to the act for protection in a case where one of the barges (with cargo), was subjected to danger from fire."

In *Ingram & Royle Limited* v. *Services Maritimes du Treport, Limited* (1914), 1 K. B. 541, sodium had been shipped on the Steamship *Hardy.* A short time after the vessel left port, sea water got at the sodium and explosions occurred and fire broke out, causing the vessel to sink. The bill of lading contained the following exceptions:

"I. * * * fire on board * * * and all accidents, loss and damage whatsoever, from defects in hull, tackle, apparatus, * * * or from perils of the seas * * * or from any act, neglect or default whatsoever, of the pilot, master, officers, engineers, crew, stevedores, servants or agents of the owners * * * ashore or afloat, in the management, loading, stowing, discharging, or navigation of the ship or other craft or otherwise, the owners * * * being in no way liable for any consequences of the causes before mentioned.

"II. It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative failing a class the exercise by the shipowners * * * or their agents of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfillment of every duty, warranty or obligation, and whether before or after the commencement of the said voyage."

It was contended at the trial before Scrutton, J., and the latter found, that the ship was unseaworthy at the commencement of the voyage owing to bad stowage which endangered her safety; that the goods were lost by fire within the meaning of s. 502 of the Merchant Shipping Act, 1894, without the fault or privity of the defendant, but that the Fire Statute was waived by the exceptions in the bill of lading above quoted.

The Court of Appeals, consisting of Justices Vaughan Williams, Buckley and Kennedy, reversed the decision of Scrutton, J., in so far as he had held that the bill of lading waived the Fire Statute. The Court of Appeals considered that the language of the bill of lading did not exclude the protection afforded to the shipowners by the statute and did not substitute for the statute contractual liability of the bill of lading.

At page 551 Vaughan Williams, L. J., said:

"In my opinion the contract must be clear to that effect. It is not sufficient to shew a contract which is reasonably capable of two interpretations. In order to exclude the statute, the Court must come to the conclusion that the interpretation which the cargo owners contend for is the true interpretation of the contract, and not merely a possible interpretation of it."

In none of the cases cited above was there any provision in the bill of lading expressly providing that the shipowner should have the benefit of all the exemptions contained in Sections 4281-4287 of the Revised Statutes of the United States.

With such a provision in the bill of lading, constituting an express contract that the carrier *shall have* the benefit of the statute, how can it reasonably be contended that a document containing such a provision constitutes a contract that the carrier *shall not have* the benefit of the statute?

Conclusion.

The Petition presents a simple case on concurrent findings.

A fire occurred on a steamer through the fault of its chief engineer in the performance of a usual and routine duty, without any neglect on the part of her owner. The Fire Statute by its clear terms constitutes a complete defense for the loss so caused.

The majority of the bills of lading, following the usual course of commerce were signed at different points in the United States by initial carriers and delivered to the

shippers at those points. Others were signed by the owner's freight agent in New York.

In all of these bills of lading it was made abundantly clear that the shipowner was to have the benefit of the Fire Statute and other sections of the Limited Liability Act already accorded him as part of the fundamental law of the land. The bills of lading were the usual and customary bills of lading issued by railroads and other carriers and agents. The record is barren of any suggestion that the shippers contracted for, or expected, any special or unusual protection for their shipments. The shipments were merely routine movements in the ordinary course of trade.

Thus the situation was obviously the customary one to which the fundamental law of the land, represented by the Limited Liability Act, applied.

Walker v. *Transportation Co.*, 3 Wall. 150, is a complete answer to all of the Petitioners' contentions.

LAST POINT.

THE DECREE OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

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Counsel for Respondent.

APPENDIX "A."

FROM PETITIONERS' BRIEF IN THE CIRCUIT COURT OF APPEALS.

POINT V.

"THE FAILURE OF RESPONDENT TO DELIVER SOME OF THE GOODS LOST AND DAMAGED ON THE 'GALILEO' WAS A BREACH OF A PERSONAL CONTRACT; TO THE LIABILITY SO CREATED THE STATUTES DO NOT APPLY."

"The many shipments described in the libel are covered by various forms of bills of lading. These bills of lading are lettered Exhibits A to R, inclusive, annexed to the libel. Appendix C annexed hereto indicates which of the clauses in those bills of lading are applicable to the issue now before the Court. *With the exception, however, of the shipments made by libellants Earle & Stoddart, Inc. and Sanday & Co., Inc., Items 1 to 9 in Exhibit S, the bills of lading were executed by other parties than the respondent.* All the bills of lading, however, contained clauses identical to those discussed under Point VI, *infra,* or they contained clauses providing substantially that the conditions of the regular form of bill of lading in use by the respondent should cover such shipments. *Consequently, except for the single point that the shipments of Earle & Stoddart, Inc. and Sanday & Co., were covered by a contract which was personally executed by the respondent, the contractual liability governing all the bills of lading is the same.* In so far as the Earle & Stoddart shipments and the Sanday & Co. shipments are concerned, however, the Statutes can have no application, because the liability of the shipowner rests upon personal contract. These bills of lading are all signed Ellerman's Wilson Line Ltd. by Ellerman's Wilson Line Inc., its 100% owned subsidiary. Such bills constitute a personal contract. See *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139. In that case, at page 149, the Court said:

'But the liability of the owners sought to be enforced here is one resting upon their personal contract; to such liability limitation acts do not apply.'

The liability, therefore, of the shipowner for these shipments cannot be disputed in any event. The liability in respect of the other shipments is equally clear, because the loss resulted from unseaworthiness and not from fire, and the Statutes have no application for that reason." (Italics ours.)

APPENDIX "B."

Bill of Lading Clauses Incorporating the Fire Statute.

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66 bills of lading, namely, Exhibits "A", "F" and "Q", attached to the libel contained the following clause:

> "It is also mutually agreed that this shipment is subject to * * * and to Sections 4281 and 4287, each inclusive of the United States Statutes."

122 bills of lading, namely Exhibits "B", "E", "I", "J", "K", "L", "M", "N", "O" and "R" attached to the libel contain a clause reading as follows:

> "This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

46 bills of lading, namely Exhibit "C" attached to the libel, contain the following clause:

> "XVII. The shipment under this bill of lading is also subject to all the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States * * *."

2 bills of lading, namely Exhibits "G" and "H" attached to the libel, contain the following clause:

> "This shipment is subject to all the terms and provisions of * * * and of Sections 4282 to 4287, each inclusive (inclusive), of the United States Revised Statutes."

1 bill of lading, namely Exhibit "D" attached to the libel, incorporates by reference the following clause:

> "The shipment under this bill of lading is also subject to all the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States * * *."

1 bill of lading, namely Exhibit "P" attached to the libel, incorporates by reference the following clause:

> "It is also mutually agreed that this shipment is subject to * * * and to Sections 4281 and 4287, each inclusive of the United States Statutes."

APPENDIX "C."

9-10 Edward VII, Chap. 61

An Act Respecting the Water-Carriage of Goods.

(Assented to 4th May, 1910.)

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. This Act may be cited as The Water-Carriage of Goods Act.

* * * * * *

7. The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies, or inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees.